

BRB No. 98-1228

ROY T. DAIL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND	)	DATE ISSUED: June 16, 1999
DRY DOCK CORPORATION	)	
	)	
Self-insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1182) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and the conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant filed a claim under the Act for work-related asbestosis. The parties stipulated that claimant worked for employer from April 10, 1956 to October 24, 1956, October 31, 1956 to October 12, 1973, and September 13, 1984 to April 6, 1985, performing ship repair and ship construction work. JX-1. The administrative law judge found that claimant was exposed to asbestos while working for employer between 1956 and 1973. Decision and Order at 4; Tr. at 12.

In July 1988, claimant procured non-covered employment with Seaboard Timber Company. EX-24c. On January 11, 1990, claimant was involved in a log truck accident while working for Seaboard. Claimant did not return to work following this accident. Tr. at 43. Claimant brought a workers' compensation claim against Seaboard for injuries resulting from this accident with the North Carolina Industrial Commission. On July 29, 1991, the parties in the state claim entered into a settlement agreement for \$15,572.01. EX-24a.

On April 5, 1996, claimant was initially diagnosed with asbestosis by Dr. Scutero, and he filed this claim under the Act on October 11, 1996. JX-1; EX-2. The parties stipulated that claimant was found to have a 15 percent respiratory impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) by Dr. Scutero on December 9, 1996, and a 30 percent respiratory impairment under the AMA *Guides* by Dr. Donlan on May 19, 1997. JX-1.

In his Decision and Order, the administrative law judge denied claimant's claim under the Act on the basis that he had been found permanently totally disabled due to the truck accident. The administrative law judge reasoned that, as one cannot be more than totally disabled, to award claimant additional compensation under the Longshore Act for his work-related asbestosis would result in a double recovery. The administrative law judge also found that claimant could receive concurrent awards of permanent partial disability compensation and permanent total disability compensation only where claimant's second injury resulted in a further loss in wage-earning capacity, which had not been shown in this case. Thus, benefits were denied.

Claimant appeals the administrative law judge's denial of benefits, contending that he did not forfeit his right to compensation under the Longshore Act by virtue of the settlement of the state workers' compensation claim for an unrelated injury. Employer responds, seeking affirmance of the decision below; claimant replies reiterating his prior arguments.

The administrative law judge's denial of compensation in this case cannot be affirmed. Contrary to the administrative law judge's determination, an award of permanent partial disability under the Act to compensate claimant for his asbestosis due to employment covered under the Act would not result in a double recovery based on the facts in this case. The Board has held that, where claimant is receiving permanent total disability benefits

**under the Act**, claimant cannot receive an additional permanent partial disability award for a work-related injury which manifests itself after his permanent total disability, because a contrary outcome would result in a double recovery **under the Act**. See, e.g., *Byrd v. J.F. Shea Construction Co.*, 18 BRBS 48 (1986), *aff'd mem.*, 802 F.2d 1483 (D.C. Cir. 1986); *Tisdale v. Owens Fiberglas Co.*, 13 BRBS 167 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1983), *cert. denied*, 462 U.S. 110 (1983); see also *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956); *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989). In *Hoey*, the Board held that a claimant was precluded from receiving permanent partial disability compensation under Section 8(c)(23) for an occupational disease that manifested itself after he retired, on the basis that claimant had previously settled a prior claim under the Act, and the settlement stated that the claimant was permanently totally disabled by the first injury. *Hoey*, 23 BRBS at 73 - 74. In *Hoey*, unlike the instant case, the claimant was permanently totally disabled **under the Act**, prior to seeking additional permanent partial disability compensation.<sup>1</sup> In this case, however, there is no danger of a double recovery, because claimant is not receiving permanent total disability benefits under the Act. In fact, claimant has never sought compensation under the Act prior to seeking permanent partial disability compensation in the instant claim. Claimant's settlement in a separate cause of action in a state workers' compensation claim which is wholly unrelated to the injury covered under the Act does not preclude his claim for permanent partial disability compensation under the Act.<sup>2</sup>

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<sup>1</sup>Furthermore, as claimant contends, in the instant case, the settlement agreement in the state claim does not state that claimant was permanently totally disabled as a result of the log truck accident. CX-24a.

<sup>2</sup>Moreover, employer is not entitled to a credit for monies paid in the settlement of the state claim, as Section 3(e) of the Act, 33 U.S.C. §903(e), provides a credit only for amounts paid to an employee for the same injury, disability or death for which benefits are claimed under the Longshore Act. See, e.g., *D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24 (CRT)(1st Cir. 1993).

It is uncontested that claimant retired after the log truck accident, for reasons wholly unrelated to his asbestosis, in January 1990. *See, e.g.*, Tr. at 43. Thus, for purposes of the Act, he is considered to be a voluntary retiree, *Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989), and, consequently, may be entitled to permanent partial disability compensation under Section 8(c)(23) of the Act. 33 U.S.C. §908(c)(23). Moreover, contrary to the administrative law judge's determination, claimant is not required to demonstrate an increased loss in wage-earning capacity due to his asbestosis in order to recover under the Act on the facts of this case. Where, as here, claimant suffers from a work-related occupational disease that becomes manifest after retirement, disability is based solely on the degree of physical impairment under the *AMA Guides*.<sup>3</sup> 33 U.S.C. §908(c)(23); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985). Consequently, claimant's claim for permanent partial disability compensation must be evaluated on its merits. Thus, we vacate the administrative law judge's denial of benefits, and remand the case for consideration of the other issues raised by the parties.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH

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<sup>3</sup>The administrative law judge's determination is tantamount to a finding that claimant is collaterally estopped from bringing a permanent partial disability claim under the Act based on his success in the North Carolina state claim. Issue and claim preclusion can only be given effect when the legal standards are the same in the previous and current jurisdictions, and where the issues in the first case were actually litigated and necessary to the outcome. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). Claimant was never adjudged to be totally disabled by the North Carolina Industrial Commission, and it has not been shown that the legal standards are the same in the state forum as those under the Act. Thus, the doctrine of collateral estoppel is not applicable in the instant case.

Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge